Supreme Court, U.S.
FILED
OCT 8 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 87-286

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC., AND U.S. TELEPHONE OF THE MIDWEST, INC.,

Petitioner,

v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF THE FIRST DISTRICT OF THE STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES BARNHILL, JR.
(Counsel of Record)
DAVIS, BARNHILL & GALLAND
3 SOUTH PINCKNEY STREET
SUITE 804
MADISON, WISCONSIN 53703
(608) 255-5200

MICHAEL T. HANNAFAN, ESQ.
THREE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60602
(312) 782-7490

QUESTIONS PRESENTED

Whether a state court decision refusing to dismiss claims of advertising and disclosure practices in violation of state and statutory common law presents any issue which is appropriately reviewable by this Court at this early stage of the proceedings.

SUPPLEMENTAL RULE 28.1 LIST

Speakers of Sport, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
SUPPLEMENTAL RULE 28.1 LIST	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES.	iv
BRIEF FOR THE RESPONDENT IN OPPOSITION	1
ADDITIONAL STATUTES INVOLVED . . .	3
COUNTERSTATEMENT OF FACTS	3
REASONS FOR DENYING THE WRIT . . .	6
THE DECISIONS OF THIS COURT DO NOT CONFLICT WITH THE CONCLUSION THAT SPEAKERS' STATE LAW CLAIMS ARE NOT PREEMPTED	9
THE ANALYSIS OF THE COURT BELOW IS CONSISTENT WITH PRINCIPLES ESTABLISHED BY THIS COURT	12
THE CONCLUSION THAT SPEAKERS' CLAIMS ARE NOT SUBJECT TO THIS FCC PRIMARY JURISDICTION IS CONSISTENT WITH NADER . .	23
THE FCC'S RULINGS DO NOT CONFLICT WITH THE DECISION OF THE COURT BELOW	24
CONCLUSION	27

TABLE OF AUTHORITIES

	Page
Ashley v. Southwestern Bell Telephone Co., 410 F.Supp. 1389 (W.D. Texas 1976)	17
Bill Correctors, Ltd. v. United States Transmission Systems, Inc. et al., FCC Dkt. No. E-84-11 (Released November 8, 1984) . .	22,26
Bruss Co. v. Allnet Communication Services, 606 F.Supp. 401 (N.D. Ill. 1985)	8
Cable Vision, Inc., v. KUTV, Inc., 211 F.Supp. 47 (D. Idaho 1962) rev'd on other grounds, 335 F.2d 348 (9th Cir. 1964) cert. denied, 379 U.S. 989 (1965)	17
California Federal Savings and Loan Association v. Guerra, ___ U.S. ___, 107 S.Ct. 683 (1987)	13,14
Certified Collateral Corp., et al., v. Allnet Communications Services, et al., FCC Dkt. No. E-86-61 (Released: April 14, 1987) . .	9,24 25,26

Page

Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701 (1st Cir. 1977) 17

Essential Communications Systems, Inc. v. American Telephone and Telegraph Co., 610 F.2d 1114 (3rd Cir. 1979) . 17

FCC v. Pottsville Broadcasting, Co., 309 U.S. 134 (1940). . . . 16

International Paper Company v. Oullette, ___ U.S. ___, 107 S.Ct. 805 (1987). 13,14,18

Ivy Broadcasting Co. v. American Telephone and Telegraph Co., 391 F.2d 486 (2d Cir. 1968). 16

Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E.2d 1045 (1986). 4,6,17

Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976) . . .13,14,18 19,21,23 28

Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), cert. denied, 107 S.Ct. 929 (1987) 16

Page

Postal Telegraph-Cable Co. v. Warren-Godwin Co., 251 U.S. 27 (1919). 10,11

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). 13,14

Sound, Inc. v. American Telephone and Telegraph Co., 631 F.2d 1324 (8th Cir. 1980). 17

Telecommunications Corp. v. Kellerman, ___ U.S. ___, 107 S.Ct. 434 (1986) 4

United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932). 21

Western Union Telegraph Co. v. Boegli, 251 U.S. 27 (1919). . 10,11

Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921). 10,11

Western Union Telegraph Co. v. Priester, 276 U.S. 252 (1928) 10,11

U.S. STATUTES

Federal Aviation Act, 49 U.S.C. Sec. 1506. 2,19

U.S. STATUTES Page

Federal Communications Act,
47 U.S.C. Sec. 151 et seq. passim

47 U.S.C. Sec. 414 3,15,19

ILLINOIS STATUTES

Illinois Consumer Fraud and
Deceptive Business Practices
Act and Uniform Deceptive
Trade Practices Act,
Ill. Rev. Stat., 1986,
Chapter 121 1/2,
Sec. 261 et seq. and
362 et seq. 3

RULES

United States Supreme
Court Rule 17. 7,28

No. 87-286

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

U.S. TELECOM, INC. f/k/a U.S. TELEPHONE, INC., AND U.S. TELEPHONE OF THE MIDWEST, INC.,
Petitioner,
v.

SPEAKERS OF SPORT, INC., on its own behalf and on behalf of all others similarly situated,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE APPELLATE COURT OF THE
FIRST DISTRICT OF THE
STATE OF ILLINOIS

BRIEF FOR THE RESPONDENT IN OPPOSITION

Respondent SPEAKERS OF SPORT, INC. ("SPEAKERS"), on its own behalf and on behalf of all others similarly situated,

respectfully requests that this Court deny the petition of U.S. TELECOM, INC. f/k/a U.S. TELEPHONE INC. AND U.S TELEPHONE OF THE MIDWEST, INC. ("US Tel" or "petitioner") for a writ of certiorari seeking review of the decision of the Appellate Court of Illinois.[1] In that decision, the Appellate Court denied petitioner's motion to dismiss SPEAKERS' state common law and statutory fraud claims as, inter alia, preempted by the Federal Communications Act ("the Communications Act"), 47 U.S.C. Sec. 151 (1982) and subject to the primary jurisdiction of the Federal Communications Commission ("the FCC"). Petitioner's request for leave to appeal was denied by the Illinois Supreme Court.

---

[1] 149 Ill. App. 3d 898, 501 N.E. 2d 318 (1st Dist. 1986), appeal denied, 114 Ill. 2d 558, 508 N.E. 2d 736 (1987).

ADDITIONAL STATUTES INVOLVED

Section 414 of the Communications Act, 47 U.S.C. Sec. 414 (1982), states:

> Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

COUNTERSTATEMENT OF FACTS

SPEAKERS filed this action as a class action on behalf of all customers of US Tel alleging that by failing to disclose to its customers and potential customers that they would be systematically charged for uncompleted telephone calls, US Tel had engaged in common law fraud and violated the Illinois Consumer Fraud and Deceptive Business Practices Act and the Uniform Deceptive Trade Practices Act.[2] SPEAKERS also alleged that petitioner's conduct

---

[2]Ill. Rev. Stat., 1986, Chapter 121 1/2, Secs. 261 et seq. and 312 et seq.

constituted common law breach of contract.

US Tel moved to dismiss the complaint on the ground that it was preempted by federal law, subject to the primary jurisdiction of the FCC, and duplicative of a similar action pending in federal court. The trial court granted the motion and SPEAKERS appealed. The Appellate Court reversed.

Following a recent Illinois Supreme Court decision in Kellerman v. MCI Telecommunications Corp., 112 Ill.2d 428, 493 N.E. 2d 1045 (1986),[3] the Court below held that although the

[3]Kellerman involved fraud claims against the defendant (MCI Telecommunications Corp. or "MCI") virtually identical to those raised here. MCI moved to dismiss on grounds of preemption and primary jurisdiction, and the trial court's denial of that motion was ultimately affirmed by the Illinois Supreme Court. Id. Last year, this Court denied MCI's petition for a writ of certiorari. Tele-communications Corp. v. Kellerman, ___U.S. ___, 107 S.Ct. 434 (1986).

Communications Act preempted claims challenging the quality of telecommunications services or the reasonableness of rates charged for said services, it did not preempt common law or statutory claims unrelated to those concerns. As a result, the Court concluded, SPEAKERS' damage claims for injury caused by US Tel's dissemination of fraudulent and deceptive advertisements were not preempted, and SPEAKERS was free to seek to hold US Tel to the same advertising and disclosure standards as any other firm, regardless of whether it was in other respects subject to federal regulation.

The Court also rejected the argument that the FCC had primary jurisdiction over SPEAKERS' claims. Finding that such claims raised no issue requiring the agency's specialized or technical expertise, it held that the trial court

had erred in dismissing them on this ground.[4]

REASONS FOR DENYING THE WRIT

The instant petition is virtually identical to the certiorari petition filed by MCI in the Kellerman case which this Court denied last year. See supra, note 1. Petitioner nonetheless contends that it should be granted, asserting conflicts with four cases decided by this Court under the Act of 1910 (the most recent decided sixty years ago), a number of federal district court decisions, and an administrative determination by the FCC. It contends further that state court proceedings, if

---

[4]The Court below also rejected the claim that the case should be dismissed as duplicative of a pending federal suit, since none of the counts in the federal court action alleged state common law or statutory claims, and the disposition of that case therefore implicated none of the considerations of comity, multiplicity and res judicata that would justify dismissal.

permitted to continue, will have a disruptive effect on the reorganization of the telecommunications industry.

Plainly, the writ should be denied. This case presents neither a "conflict" as contemplated by Supreme Court Rule 17, nor any issue of sufficient importance to warrant this Court's concern.

First, the four cases decided under the Act of 1910 do not create any conflict warranting review. Not only are they distinguishable from the instant case, but this Court's more recent analyses of the preemption and primary jurisdiction doctrines fully support the decision of the Court below.

Second, notwithstanding that a number of federal district courts have reached different results with respect to different complaints (which included claims, not present here, that the charges were "unreasonable" or "unjust"

within the meaning of the Communications Act), those decisions do not create a conflict within the meaning of Supreme Court Rule 17. Moreover, at least one federal district court has held, on indistinguishable facts, that federal preemption is not warranted. Bruss Co. v. Allnet Communication Services, 606 F.Supp. 401 (N.D. Ill. 1985).

Third, there is no possibility of conflict between vindication of SPEAKERS' claims and the FCC interpretations on which US Tel relies. Far from immunizing US Tel from responsibility for SPEAKERS' claims, the FCC has endorsed the principle of disclosure as consistent with federal policy.

Finally, this case raises no issue of sufficient importance to warrant this Court's review at this early stage. US Tel has made no showing to support its contention that the litigation will, if

permitted to proceed, cause any disruption to the reorganization of the telecommunications industry. Indeed as a practical matter, it appears that resolution of the technical problem (lack of "answer supervision") alleged to have been fraudulently concealed is imminent. See In re: Certified Collateral Corp., et al. v. Allnet Communications Services, et al. ("Allnet"), FCC Dkt. No. E-86-61 (Released: April 14, 1987), para. 4. (Appendix E.) Thus, this action will not obstruct the accomplishment of any federal purpose.

I.

THE DECISIONS OF THIS COURT DO NOT CONFLICT WITH THE CONCLUSION THAT SPEAKERS' STATE LAW CLAIMS ARE NOT PREEMPTED

Petitioner's analysis of this Court's preemption decisions relies exclusively on cases decided sixty years

ago and more,[5] and disregards developments in the law over recent years. These developments have clarified and refined the law, and made clear that the earlier decisions are limited to their particular facts. That is, in each of the four cases cited by US Tel, the plaintiffs' claims related directly to the rates charged for telegraph services and limits on liability for the quality of those services. They therefore fell unmistakably within the scope of the Act of 1910, whose "outstanding consideration [was] that of uniformity and equality of rates." Esteve Bros., 256 U.S. at 572.

The plaintiffs in Warren-Godwin, Esteve Bros. and Priester each challenged

---

[5] Postal Telegraph-Cable Co. v. Warren-Godwin Co., 251 U.S. 27 (1919); Western Union Telegraph Co. v. Boegli, 251 U.S. 315 (1920); Western Union Telegraph Co. v. Esteve Bros. & Co., 256 U.S. 566 (1921), and Western Union Telegraph Co. v. Priester, 276 U.S. 252 (1928).

fixed rates for the transmission of "unrepeated" telegraph messages, i.e., messages sent at a discounted rate and therefore subject to a more limited liability than available under state negligence law. Such rates were expressly authorized by the Act of 1910 which permitted classification of messages "into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as are just and reasonable." The Act also provided explicitly that "different rates may be charged for the different classes of messages." The plaintiff in Boegli, on the other hand, challenged a state law penalty for negligent failure to deliver a telegram. The federally fixed rates and limits on liability for unrepeated messages in the first three cases were enforced, and the state penalty in the fourth held preempted, all in furtherance

of the federal objective of ensuring uniform and equal rates.

By contrast, SPEAKERS' claims in this case do not relate to the statutory purpose of the Communications Act in ensuring quality service at uniform and reasonable rates. As demonstrated infra, current principles of law establish that their dismissal on preemption grounds is unwarranted.

II.

THE ANALYSIS OF THE COURT BELOW IS CONSISTENT WITH PRINCIPLES ESTABLISHED BY THIS COURT

A recent series of preemption decisions by this Court supports the conclusion of the Court below that SPEAKERS' state law claims are not preempted because they do not fall within the scope of, and do not create any irreconcilable conflict with, federal

law.[6] In Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), for example, this Court set out the two basic ways in which state law can be preempted. Where Congress evidences an intent to occupy an entire field of activity, any state law within that field will be preempted. 464 U.S. at 248. Disputes will arise only as to whether a particular claim is or is not "within the field." Where federal legislation has not entirely displaced state regulation, as evidenced for example by a savings clause, state law is preempted only to the extent that it conflicts with federal law. This occurs either when compliance with both state and federal law is impossible, or when

---

[6] Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984); California Federal Savings and Loan Association v. Guerra, ___ U.S. _____, 107 S.Ct. 683 (1987); International Paper Company v. Oullette, __ U.S. ____, 107 S.Ct. 805 (1987); Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976).

the state law in question obstructs the accomplishment of the legislative purpose. Id.[7]

The express purpose of Communications Act regulation is to

---

[7]In Silkwood, the Court held that the plaintiff's state damage claims for injuries caused by radioactive contamination were not preempted by the Atomic Energy Act, by which act the federal government had "occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." Notwithstanding that the plaintiff's state claims for personal injury had not been expressly preserved, the Court relied on legislative history to conclude that Congress intended that they survive.

See also California Federal Savings and Loan Association v. Guerra, 107 S.Ct. at 689 (state law regulating pregnancy discrimination not preempted by federal law, where Congress explicitly disclaimed categorical preemption and the state law neither conflicted with federal law nor obstructed underlying federal policy); International Paper Company v. Oullette, 107 S.Ct. at 811-12 (state law not preempted by Clean Air Act where not inconsistent with Act, and thus within the scope of savings clause); Nader v. Allegheny Airlines, Inc., 426 U.S. at 300 (state law claims preserved by savings clause and not inconsistent with provisions or purposes of Federal Aviation Act).

monitor the quality of and rates charged for interstate telecommunications services in order to "'make available ... to all the people of the United States a rapid, efficient ... communication service with adequate facilities at reasonable charges.'" 47 U.S.C. Sec. 151. Thus, the Act's primary concern is with the quality and cost of service, as opposed to SPEAKERS' concern over standards for advertising to potential customers, the focus of SPEAKERS' concern in this case.

That Congress did not intend to supplant state laws addressing other concerns is evident from the Act's broad savings clause, 47 U.S.C. Sec. 414, which states that "[n]othing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such

remedies."[8] As long ago as 1940, this Court recognized that the Communications Act was not designed as a new code for the adjustment of private rights. FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940). More recently, a federal court of appeals held that the effect of the Act's savings clause was to preserve state-law remedies that do not interfere with the federal government's authority over telephone charges or

---

[8]Neither federal court of appeals decision cited by US Tel, Ivy Broadcasting Co. v. American Telephone and Telegraph Co., 391 F.2d 486, 490 (2d Cir. 1968) and Nordlicht v. New York Telephone Co., 799 F.2d 859 (2d Cir. 1986), cert. denied, 107 S.Ct. 929 (1987) so much as acknowledged the existence of the savings clause, perhaps because the claims in those cases related directly to the quality and rates of the service provided. The plaintiff in Ivy complained explicitly of "standards" of the service provided and the extent of the defendant's liability for failure to comply with such standards. The plaintiff in Nordlicht challenged the lawfulness of the defendant's charging practices.

services, and which did not otherwise conflict with an express provision of the Act. Comtronics, Inc. v. Puerto Rico Telephone Co., 553 F.2d 701, 707-08, n.6 (1st Cir. 1977).[9]

The conclusion of the Court below that SPEAKERS' claims are not preempted presents no conflict with decisions of this Court. Although federal law clearly

---

[9]See also Kellerman, 112 Ill.2d at 440-41; Ashley v. Southwestern Bell Telephone Co., 410 F.Supp. 1389 (W.D. Texas 1976)(plaintiff's invasion of privacy tort action against the telephone company for disclosure of telephone records and wiretaps held not preempted by Communications Act); Cable Vision, Inc. v. KUTV, Inc., 211 F.Supp. 47 (D. Idaho 1962) rev'd on other grounds, 335 F.2d 348 (9th Cir. 1964) cert. denied 379 U.S. 989 (1965)(contractual dispute not related to the rendition of interstate communication services held not preempted by the Communications Act); Essential Communications Systems, Inc. v. American Telephone and Telegraph Co., 610 F.2d 1114, 1120-21 (3rd Cir. 1979) and Sound, Inc. v. American Telephone and Telegraph Co., 631 F.2d 1324, 1329 (8th Cir. 1980)(anti-trust laws held not preempted by Communications Act.)

dominates the field of telecommunications regulation, the savings clause of the Communications Act negates the inference that Congress "left no room" for state causes of action. Cf. International Paper Company, 107 S.Ct. at 812. Rather, the concerns of federal policy are limited to supervision of the quality and rates of interstate service, leaving parties free to address other concerns under state law so long as compliance with both state and federal law is possible, and the vindication of such claims does not interfere with the accomplishment of the purposes and objectives of Congress.

In Nader v. Allegheny Airlines, Inc., the Court applied precisely this test to facts nearly identical to those of this case when it considered the preemptive effect of the Federal Aviation Act. After being "bumped" from an

overbooked flight, the plaintiff in Nader sued the airline for fraudulent misrepresentation. Like SPEAKERS in this case, he did not challenge the quality of or charges for the airline's service, but complained instead of its failure to disclose to him in advance of the sale of his ticket that its flights were systematically overbooked.

The airline moved to dismiss on the ground that the FAA had conferred primary jurisdiction over such claims on the Civil Aeronautics Board ("CAB"). The Court disagreed. Noting both the stated purpose of the FAA to promote "adequate, economical and efficient service... at the lowest cost," and the FAA's savings clause (virtually identical to Section 414 of the Communications Act),[10] the

---

[10]It provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing by common law or by statute, but

Court concluded that Congress intended that common law or statutory claims survive absent irreconcilable conflict with the federal statutory scheme. Notwithstanding the explicit statutory authority of the Civil Aeronautics Board ("CAB") to investigate "unfair or deceptive practices" and a then on-going rulemaking proceeding concerning the very overbooking practices as to which the plaintiff alleged he was defrauded, the Court found that no such conflict existed. It explained:

> There is no [CAB] requirement that air carriers engage in overbooking or that they fail to disclose that they do so. Any impact on rates that may result from the imposition of tort liability or from practices adopted by a carrier to avoid such liability would merely be incidental. Under the circumstances, the common-law action and the statute are not "absolutely inconsistent" and may coexist, as

---

the provisions of this chapter are in addition to such remedies." 49 U.S.C. Sec. 1506.

> contemplated by the [savings clause].

426 U.S. 300.[11]

The Court's reasoning in Nader is fully applicable here. The FCC does not require that telephone companies bill for uncompleted calls, or that they fail to

---

[11] US Tel seeks to distinguish Nader on the ground that the CAB, unlike the FCC, has no authority to entertain private claims or grant private remedies. It relies on United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474 (1932), to argue that since the Communications Act provides a remedial scheme for private complaints, and authorizes the FCC to prescribe as well as prohibit carriers' conduct, its jurisdiction over private claims is exclusive.

The distinction does not square with Court's analysis of the Cunard decision in Nader. In Cunard, an antitrust action was dismissed on primary jurisdiction grounds because initial consideration by the Interstate Commerce Commission had not been sought. As the Court observed in Nader, however, the plaintiff's antitrust claims were covered by unambiguous provisions of the Shipping Act which explicitly exempted affected shipping companies from the operation of the antitrust laws. 462 U.S. at 301. In the instant case, no exemption immunizing carriers from state law liability is present.

disclose that they do so. Indeed, the FCC has stated its view that disclosure to customers would be beneficial. See Bill Correctors, Ltd. v. United States Transmission Systems, Inc., et al., ("Bill Correctors") FCC Dkt. No. E-84-11 (Released: November 8, 1984), paras. 8-9. Any impact on the quality of services or the rates for those services that could result from the imposition of state law would be incidental at most. Thus, SPEAKERS' state law claims are not "absolutely inconsistent" with the Communications Act, and may easily coexist with it as contemplated by the savings clause.

III.

THE CONCLUSION THAT SPEAKERS' CLAIMS ARE NOT SUBJECT TO THIS FCC PRIMARY JURISDICTION IS CONSISTENT WITH NADER

The rejection by the Court below of US Tel's primary jurisdiction argument is also consistent with Nader, in which this

Court rejected the airline's contention that the doctrine of primary jurisdiction required referral of the plaintiff's claims to the CAB to permit it to determine whether its overbooking practice was "deceptive" within the meaning of the FAA. This Court held:

> Referral of the misrepresentation issue to the Board cannot be justified by the interest in informing the court's ultimate decision with "the expert and specialized knowledge," of the Board. The action brought by petitioner does not turn on a determination of the reasonableness of a challenged practice - a determination that could be facilitated by an informed evaluation of the economics or technology of the regulated industry. The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.

462 U.S. at 305-6 (citations omitted). Here, SPEAKERS' claims do not turn on a determination of the <u>reasonableness</u> of

US Tel's billing practices, as to which evaluation of economic and technical considerations might come into play. Rather, the standards implicated by its action for fraud are well within the conventional competence of the state court.

IV.

THE FCC'S RULINGS DO NOT CONFLICT WITH THE DECISION OF THE COURT BELOW

Finally, US Tel argues that the FCC's recent decision in Allnet, supra, preempts SPEAKERS' state-law claims. Contrary to US Tel's assertion, the allegations rejected by the FCC in that decision were not identical to those made here. The FCC charges focused on the charges imposed by various named carriers, rather than the carriers' fraudulent failure to disclose those charges in advance. They alleged simply "that each [complainant] purchased

telecommunications services from one or more of the defendant carriers and each has been overcharged for some of those services," and they sought "refund of the overcharges and relief from the practices leading to the overcharges." Allnet at para. 1.

Thus, unlike the claims in the instant case, the administrative charges in Allnet were well within the scope of the agency's primary concerns. But even if they had been otherwise, their rejection by an unreviewed ruling of an administrative agency would hardly give rise to a level of conflict that would warrant this Court's review.

In any event, the FCC ruling creates no conflict with SPEAKERS' state court claims. In its earlier ruling in Bill Correctors supra, to which the Allnet decision refers, the agency expressed its

views on the value of disclosure, stating:

> [W]e believe that the consumer, if provided with information as to each carrier's charging practices, can determine whether the service adequately protects against unreasonable overcharges. Customers informed of their carrier's charging practices can best evaluate whether a particular service meets their needs in the competitive marketplace... Therefore, we believe it is beneficial to make customers aware of the practices the carriers employ to guard against inadvertent overcharging resulting from the current deficiencies in the interexchange arrangements of local exchange carriers.

Bill Correctors at paras. 8-9, (emphasis supplied). If anything, these comments demonstrate that SPEAKERS' claims are fully consistent with federal policy, and negates any suggestion of conflict between those claims and the purposes or enforcement of the Communications Act.

CONCLUSION

The savings clause of the Communications Act negates any inference

that Congress intended to preempt all state law claims against telecommunications carriers. The Act is directed not to setting standards for advertising, but rather to ensuring the availability of quality communications services at reasonable rates. There is no possible conflict, therefore, between the federal law and SPEAKERS' claims of common law and statutory fraud.

Moreover, given the unrelatedness of those claims to the technical mission of the FCC, there is no ground for dismissal of SPEAKERS' claims as subject to the primary jurisdiction of the FCC. Their resolution will require none of the agency's technical expertise and is well within the conventional competence of the state court.

Accordingly, there is no reason for the Court to concern itself now with this case. The effect of the present

litigation on federal regulation of the telecommunications industry will be, at the very most, incidental. Nader, 426 U.S. at 300. Petitioner has made no showing otherwise. It has also failed to demonstrate any conflict within the meaning of the Supreme Court Rule 17, or to substantiate its claims about the doctrinal and practical importance of this case which is wholly peripheral to any vital issue that might attract Court's concern.

WHEREFORE, SPEAKERS respectfully requests this Court to deny the petition for writ of certiorari.

Respectfully submitted,

CHARLES BARNHILL
(Counsel Of Record)
DAVIS, BARNHILL & GALLAND
3 SOUTH PINCKNEY STREET
SUITE 804
MADISON, WISCONSIN 53703
(608) 255-5200

MICHAEL T. HANNAFAN
MICHAEL T. HANNAFAN, LTD.
THREE FIRST NATIONAL PLAZA
CHICAGO, ILLINOIS 60602
(312) 782-7490

ATTORNEYS FOR RESPONDENT